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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

TERM. 197 78-1832

NO. ____

JULIUS T. CUYLER, SUPERINTENDENT

AND

DISTRICT ATTORNEY OF PHILADELPHIA,
PETITIONER

V.

JOHN SULLIVAN, RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

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IN THE

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JULIUS T. CUYLER, SUPERINTENDENT

AND

DISTRICT ATTORNEY OF PHILADELPHIA,
PETITIONER

V.

JOHN SULLIVAN, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THE PETITIONER, DISTRICT ATTORNEY OF PHILADELPHIA, RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED IN THE ABOVE-ENTITLED CASE ON FEBRUARY 14, 1979.

OPINIONS BELOW

THE ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING IN BANC, JUDGES GARTH, ADAMS AND ROSENN DISSENTING, OFFICIALLY REPORTED AT 593 F.2D 512, 524 (3D CIR. 1979), IS SET OUT AS APPENDIX A. THE OPINION OF THE COURT OF APPEALS, OFFICIALLY REPORTED AT 593 F.2D 512 (3D CIR. 1979), IS SET

OUT AS APPENDIX B. THE UNREPORTED OPINION OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, ADOPTING AND INCORPORATING IN PART THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE, IS SET OUT AS APPENDIX C. THE OPINION OF THE SUPREME COURT OF PENNSYLVANIA DENYING POST CONVICTION RELIEF, REPORTED AS COMMONWEALTH V. SULLIVAN, 472 PA. 129, 371 A.2D 468 (1977), IS SET OUT AS APPENDIX D. THE OPINION OF THE SUPREME COURT OF PENNSYLVANIA, AFFIRMING THE JUDGMENT OF SENTENCE, REPORTED AS COMMONWEALTH V. SULLIVAN, 446 PA. 419, 286 A.2D 898 (1971), IS SET OUT AS APPENDIX E. THE UNREPORTED OPINION OF THE PHILADELPHIA COURT OF COMMON PLEAS DENYING POST CONVICTION RELIEF IS SET OUT AS APPENDIX F.

JURISDICTION

THE ORDER OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT WAS ENTERED ON FEBRUARY 14, 1979. A PETITION FOR REHEARING IN BANC WAS TIMELY FILED AND DENIED ON MARCH 12, 1979. THIS PETITION FOR CERTIORARI WAS FILED WITHIN NINETY DAYS OF THE FINAL ORDER OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT. THIS COURT'S JURISDICTION IS INVOKED UNDER 28 U.S.C. §1254(1)

QUESTIONS PRESENTED

I. IS THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL VIOLATED MERELY BY A DETERMINATION THAT A POSSIBLE CONFLICT OF INTEREST, HOWEVER REMOTE, MAY EXIST?

II. ASSUMING THAT THE ABOVE STANDARD IS COMPELLED UNDER THE SIXTH AMENDMENT IN CASES OF JOINT REPRESENTATION AND COURT-APPOINTED COUNSEL, IS THE SAME STANDARD OF REVIEW REQUIRED HEREIN, WHERE RESPONDENT AND HIS CO-DEFENDANTS WERE SEPARATELY TRIED AND REPRESENTED BY TWO PRIVATELY RETAINED ATTORNEYS?

III. DID THE COURT BELOW VIOLATE SETTLED PRINCIPLES OF HABEAS CORPUS REVIEW, AS ENUNCIATED BY THIS COURT AND CONGRESS, BY IGNORING THE FACTUAL DETERMINATIONS OF THE STATE COURTS AND SUBSTITUTING ITS FINDINGS FOR THOSE OF THE STATE AND DISTRICT COURTS?

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT SIX.

IN ALL CRIMINAL PROCEEDINGS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN, SECTION 1.

ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL

MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

STATUTORY PROVISION INVOLVED

THE UNITED STATES CODE, ACT OF JUNE 25, 1948, c 646, 62 STAT. 967; AS AMENDED NOV. 2, 1966, PUB. L. 89-711, §2, 80 STAT. 1105, 28 U.S.C. §2254(D).

(D) IN ANY PROCEEDING INSTITUTED IN A FEDERAL COURT BY AN APPLICATION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT, A DETERMINATION AFTER A HEARING ON THE MERITS OF A FACTUAL ISSUE, MADE BY A STATE COURT OF COMPETENT JURISDICTION IN A PROCEEDING TO WHICH THE APPLICANT FOR THE WRIT AND THE STATE OR AN OFFICER OR AGENT THEREOF WERE PARTIES, EVIDENCED BY A WRITTEN FINDING, WRITTEN OPINION, OR OTHER RELIABLE AND ADEQUATE WRITTEN INDICIA, SHALL BE PRESUMED TO BE CORRECT, UNLESS THE APPLICANT SHALL ESTABLISH OR IT SHALL OTHERWISE APPEAR, OR THE RESPONDENT SHALL ADMIT -

(1) THAT THE MERITS OF THE FACTUAL DISPUTE WERE NOT RESOLVED IN THE STATE COURT HEARING; ...

(8) OR UNLESS THAT PART OF THE RECORD OF THE STATE COURT PROCEEDING IN WHICH THE DETERMINATION OF SUCH FACTUAL ISSUE WAS MADE, PERTINENT TO A DETERMINATION OF THE SUFFICIENCY OF THE

EVIDENCE TO SUPPORT SUCH FACTUAL DETERMINATION, IS PRODUCED AS PROVIDED FOR HEREINAFTER, AND THE FEDERAL COURT ON A CONSIDERATION OF SUCH PART OF THE RECORD AS A WHOLE CONCLUDES THAT SUCH FACTUAL DETERMINATION IS NOT FAIRLY SUPPORTED BY THE RECORD:

AND IN AN EVIDENTIARY HEARING IN THE FEDERAL COURT, WHEN DUE PROOF OF SUCH FACTUAL DETERMINATION HAS BEEN MADE, UNLESS THE EXISTENCE OF ONE OR MORE OF THE CIRCUMSTANCES RESPECTIVELY SET FORTH IN PARAGRAPHS NUMBERED (1) TO (7), INCLUSIVE, IS SHOWN BY THE APPLICANT, OTHERWISE APPEARS, OR IS ADMITTED BY THE RESPONDENT, OR UNLESS THE COURT CONCLUDES PURSUANT TO THE PROVISIONS OF PARAGRAPH NUMBERED (8) THAT THE RECORD IN THE STATE COURT PROCEEDING, CONSIDERED AS A WHOLE, DOES NOT FAIRLY SUPPORT SUCH FACTUAL DETERMINATION, THE BURDEN SHALL REST UPON THE APPLICANT TO ESTABLISH BY CONVINCING EVIDENCE THAT THE FACTUAL DETERMINATION BY THE STATE COURT WAS ERRONEOUS.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

RESPONDENT, JOHN SULLIVAN, WAS INDICTED BY THE PHILADELPHIA COUNTY GRAND JURY ON NOVEMBER 14, 1966, AS OF NOVEMBER SESSIONS, 1966, NOS. 190 AND 193, EACH CHARGING MURDER. RESPONDENT'S CO-DEFENDANTS, GREGORY CARCHIDI AND ANTHONY DIPASQUALE, WERE ALSO INDICTED AFTER A MEDICAL EXAMINER'S INQUEST. THESE CHARGES AROSE AS A CONSEQUENCE OF THE ASSASSINATION-LIKE KILLINGS OF JOHN GOREY AND RITA JANDA OCCURRING ON JUNE 17, 1966, AT THE TEAMSTER'S LOCAL UNION HALL. TRIAL WAS HELD BEFORE THE HONORABLE ALEXANDER F. BARBIERI AND A JURY BETWEEN JUNE 7, AND JUNE 19, 1967. ON THE LATTER DATE, RESPONDENT WAS CONVICTED OF TWO COUNTS OF FIRST DEGREE MURDER AND SENTENCED TO LIFE IMPRISONMENT. RESPONDENT WAS REPRESENTED BY PRIVATELY RETAINED COUNSEL, G. FRED DIBONA, ESQUIRE, NOW A PHILADELPHIA COURT OF COMMON PLEAS JUDGE, AND A. CHARLES PERUTO, ESQUIRE. BOTH COUNSEL WERE ALSO RETAINED BY RESPONDENT'S CO-DEFENDANTS, WHO WERE EACH TRIED SEPARATELY AND ACQUITTED SUBSEQUENT TO RESPONDENT'S TRIAL. JUDGE DIBONA ACTED AS RESPONDENT'S CHIEF COUNSEL, WHEREAS THE ROLES WERE REVERSED IN THE TRIALS OF THE CO-DEFENDANTS. POST TRIAL MOTIONS WERE DENIED BY A COURT EN BANC ON JULY 15, 1968. ON AUGUST 9, 1968, RESPONDENT WAS SENTENCED TO TWO CONSECUTIVE TERMS OF LIFE IMPRISONMENT.

A DIRECT APPEAL WAS TAKEN TO THE SUPREME COURT OF PENNSYLVANIA, WHICH AFFIRMED THE CONVICTION BY AN EQUALLY DIVIDED COURT. COMMONWEALTH V. SULLIVAN, 446 PA. 419, 286 A.2D 898 (1971) (APPENDIX E, INFRA, AT 1E). IN 1973, RESPONDENT FILED A PETITION UNDER THE PENNSYLVANIA POST CONVICTION HEARING ACT,[1] CHALLENGING, INTER ALIA, HIS REPRESENTATION BY COUNSEL, WHO IT WAS ALLEGED, NEGLECTED TO PRESENT ANY DEFENSE ON HIS BEHALF BECAUSE OF THEIR DUAL REPRESENTATION OF HIS CO-DEFENDANTS. AFTER SEVERAL EVIDENTIARY HEARINGS BEFORE THE HONORABLE ETHAN ALLEN DOTY, OF THE PHILADELPHIA COURT OF COMMON PLEAS, RESPONDENT WAS GRANTED THE RIGHT TO APPEAL TO THE PENNSYLVANIA SUPREME COURT NUNC PRO TUNC. RELIEF WAS OTHERWISE DENIED (APPENDIX F, INFRA, AT 1F).

ON FEBRUARY 28, 1977, THE PENNSYLVANIA SUPREME COURT AFFIRMED THE DECISION OF THE LOWER COURT DENYING POST CONVICTION RELIEF. COMMONWEALTH V. SULLIVAN, 472 PA. 129, 371 A.2D 468 (1977) (APPENDIX D, INFRA, AT 1D). THE COURT HELD, INTER ALIA, THAT RESPONDENT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL SINCE (1) THERE WAS NO DUAL REPRESENTATION IN THE TRADITIONAL SENSE, AND (2) THE DECISION WHETHER TO PRESENT A DEFENSE WAS A TACTICAL DECISION, NOT BASED UPON ANY CONFLICTING INTERESTS IN COUNSEL'S REPRESENTATION OF THE CO-DEFENDANTS.

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1 ACT OF JANUARY 25, 1966, P.L. (1965) 1580, §1, 19 P.S. §1180-1 ET SEQ. (SUPPLEMENT 1978-1979).

On July 18, 1977, respondent filed his fourth petition[2] for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania, docketed as Civil Action No. 77-2527. On February 2, 1978, United States District Judge John Morgan Davis denied the petition, adopting in part the Report and Recommendation of United States Magistrate Edwin E. Naythons (Appendix C, infra, at 1C). The Magistrate had recommended the issuance of the writ on Sixth Amendment grounds.

Respondent appealed on various grounds, and the case was argued before a panel of the United States Court of Appeals for the Third Circuit. On February 14, 1979, the Court of Appeals, on the basis of the state court record, reversed the order of the United States District Court and granted habeas corpus relief.[3] United States ex rel. Sullivan v. Cuyler, 593 F.2d 512 (3rd Cir. 1979) (Appendix B, infra, at 1B). The Commonwealth's petition for rehearing in banc was denied by that Court, Judges Garth, Adams and Rosenn dissenting, on March 12, 1979 (Appendix A, infra, at 1A).

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2 Three prior federal habeas corpus petitions were dismissed for failure to exhaust state remedies. United States ex rel. John Sullivan v. Rundle, No. 69-244; United States ex rel. John Sullivan v. A. T. Rundle, No. 69-452; United States ex rel. John Sullivan v. Robert L. Johnson, CA No. 73-1694.

3 The Court of Appeals granted relief on Sixth Amendment grounds and therefore failed to consider the other issues raised by respondent.

Factual History

The evidence surrounding respondent's conviction was amply summarized by the Pennsylvania Supreme Court as follows:

> The chief prosecution witness, one Francis McGrath, was employed as a janitor at the union hall where the bodies were eventually discovered. On July 17, 1966, he arrived at work at approximately 6:00 P.M. and parked his automobile in the lot adjacent to the building. At that time, he specifically observed two other vehicles on the premises. One was owned by appellant and the other was being used at the time by one Anthony DiPasquale. After alighting from his car, McGrath noticed appellant looking out onto the parking lot from the window of a second floor office normally used by other union officials. The witness then entered the building and proceeded to the second floor to commence his duties. Appellant was still seated by the window when McGrath entered that office. Sullivan inquired about the janitor's presence and instructed McGrath to wait until Sunday night to clean, since a union meeting was scheduled for that date and the building would require cleaning after the gathering. McGrath ignored the suggestion and continued collecting the trash from the offices. The witness then took the refuse outside the building. When he returned, appellant was still seated at the window.
>
> At this time, both Sullivan and McGrath observed John Gorey and Rita Janda arrive at the union hall in Gorey's car and enter the building. McGrath then began cleaning the conference room, located approximately 75 feet from Gorey's office. Shortly thereafter, Gorey appeared and had a brief conversation with McGrath. Immediately after Gorey left the conference room, appellant appeared in the doorway, through which Gorey had just passed, and again questioned McGrath about the cleaning and suggested he defer his activities until Sunday afternoon. During this brief conversation, Gregory Carchidi, another janitor, entered the conference room. No conversation ensued between Carchidi and Sullivan but Carchidi repeated appellant's urgings to leave the work until Sunday. Sullivan then left the room through the same door which Gorey had exited but Carchidi remained and seated himself behind the desk.

WITHIN SEVERAL MINUTES, THE WITNESS TESTIFIED HE HEARD SOUNDS LIKE FIRECRACKERS GOING OFF IN RAPID SUCCESSION. MCGRATH STARTED TO QUESTION CARCHIDI ABOUT THE DISTURBANCE BUT WAS ABRUPTLY INSTRUCTED TO "GET OUT OF THE BUILDING AND DON'T SAY NOTHING" (SIC). MCGRATH LEFT THE UNION HALL AND NOTICED FOUR CARS OTHER THAN HIS OWN PARKED IN THE LOT. THESE WERE RECOGNIZED AS BELONGING TO DIPASQUALE, GOREY, CARCHIDI AND APPELLANT. MCGRATH DROVE OFF BUT RETURNED TO THE PREMISES WITHIN 15 MINUTES. ONLY GOREY'S CAR REMAINED IN THE LOT. UPON RE-ENTERING THE BUILDING, HE FOUND THE OFFICES CLOSED, THE CONFERENCE ROOM LOCKED AND THE LIGHTS OUT.

THE VICTIMS' BODIES WERE DISCOVERED THE FOLLOWING MORNING. GOREY HAD BEEN SHOT FOUR TIMES AND JANDA SIX TIMES, THE SHOTS BEING FIRED FROM CLOSE RANGE. THE BALLISTICS STUDIES ESTABLISHED TWO SEPARATE GUNS WERE EMPLOYED IN THE HOMICIDES BUT THE WEAPONS WERE NEVER RECOVERED.

ADDITIONAL TESTIMONY DISCLOSED THAT THE TELEPHONE LINES HAD BEEN ARRANGED SO THAT REGULAR INCOMING CALLS WOULD RING IN THE ROOM IN WHICH APPELLANT WAS SEATED. A SECOND LINE WITH A DIFFERENT CALL NUMBER HAD BEEN PREARRANGED BY GOREY TO RING IN HIS OFFICE SO THAT HE COULD RECEIVE AN ANTICIPATED CALL FROM JOSEPH VERNICK AT 7:00 P.M. ONE IRENE GLENN TESTIFIED FOR THE COMMONWEALTH THAT SHE DIALED THE REGULAR UNION PHONE NUMBER ABOUT 6:15 P.M. THAT EVENING AND A MAN ANSWERED IDENTIFYING HIMSELF AS GOREY. A SCRAP PAPER FOUND IN THE WASTEBASKET ALONGSIDE THE DESK WHERE APPELLANT HAD BEEN SEATED PRIOR TO THE VICTIM'S (SIC) ARRIVAL CONTAINED MS. GLENN'S NAME AND TELEPHONE NUMBER. IT WAS UNCONTESTED THAT THE HANDWRITING WAS THAT OF APPELLANT. MOREOVER, ONE JOSEPH VERNICK TESTIFIED THAT HE CALLED GOREY'S OFFICE AT A SPECIALLY ARRANGED TIME BUT RECEIVED NO ANSWER DESPITE HIS REPEATED ATTEMPTS BETWEEN 7:15 AND 8:15 P.M. THIS EVIDENCE, COUPLED WITH THE MEDICAL EXAMINER'S TESTIMONY, INDICATED THAT THE TIME OF DEATH COULD HAVE BEEN APPROXIMATELY 7:15 P.M. ... ADDITIONAL EVIDENCE OF GUILT MAY ALSO BE INFERRED FROM APPELLANT'S STATEMENTS TO POLICE. DURING QUESTIONING SEVERAL DAYS AFTER THE MURDERS, SULLIVAN DENIED BEING PRESENT AT THE BUILDING DURING THE TIME OF THE SHOOTINGS. THIS CONTRADICTED MCGRATH'S STATEMENT WHICH PLACED SULLIVAN IN DIRECT

PROXIMITY TO THE CRIME ONLY MOMENTS BEFORE ITS OCCURRENCE. MOREOVER, MCGRATH STATED THAT WHEN HE LEFT THE BUILDING SULLIVAN'S CAR WAS STILL PARKED IN THE LOT.

COMMONWEALTH V. SULLIVAN, SUPRA, 472 PA. AT 147-49, 151, 371 A.2D AT 477-479.

RESPONDENT DID NOT TESTIFY AND NO EVIDENCE WAS INTRODUCED ON HIS BEHALF.

IN SUPPORT OF ITS DECISION GRANTING THE WRIT, THE COURT BELOW RELIED SOLELY UPON CERTAIN CONTRADICTED AND INCONSISTENT TESTIMONY OF ONE OF RESPONDENT'S TRIAL ATTORNEYS GIVEN AT THE STATE POST CONVICTION HEARING.[4] THE TESTIMONY RELIED UPON WERE STATEMENTS OF ATTORNEY PERUTO, WHO TWICE INDICATED THAT ONE REASON, AMONG OTHERS, FOR HIS RECOMMENDATION THAT RESPONDENT NOT TESTIFY OR PRESENT OTHER WITNESSES WAS A DESIRE NOT TO REVEAL DEFENSE WITNESSES BEFORE THE TRIAL OF THE TWO CO-DEFENDANTS (N.T. P.C.H.A. 4/24/74, 101-102, 107). PERUTO ALSO TESTIFIED TO OTHER STRATEGIC REASONS WHY HE RECOMMENDED THAT RESPONDENT NOT TESTIFY (N.T. P.C.H.A. 4/24/74, 102) OR CALL OTHER DEFENSE WITNESSES (N.T. P.C.H.A. 4/24/74, 20, 99-100, 105-107, 118, 122).

PERUTO'S TESTIMONY ABOUT HIS DESIRE TO PROTECT THE CO-DEFENDANTS WAS CONTRADICTED, HOWEVER, BY JUDGE DIBONA, WHO, AS CHIEF COUNSEL, TESTIFIED THAT THE DECISION NOT TO PRESENT A DEFENSE, EITHER THROUGH RESPONDENT OR THROUGH OTHER WITNESSES,

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[4] TESTIMONY ELICITED AT SAID HEARING, WHICH SPANNED FIVE DAYS, WILL BE HEREINAFTER CITED AS N.T. P.C.H.A., WITH ADDITIONAL REFERENCE TO THE PARTICULAR DATE SUCH TESTIMONY WAS TAKEN.

WAS MADE BY RESPONDENT AFTER DISCUSSION WITH COUNSEL (N.T. P.C.H.A. 5/15/74. 5-7, 16), AND WAS IN NO WAY INFLUENCED BY THE REPRESENTATION OF THE CO-DEFENDANTS (N.T. P.C.H.A. 5/15/74, 6). JUDGE DIBONA TESTIFIED FURTHER THAT HE WAS FULLY PREPARED TO TRY RESPONDENT'S CASE; THAT HE HAD FULL CONSULTATION WITH RESPONDENT EVERY STEP OF THE WAY; AND THAT HE SAW NO CONFLICT WHATSOEVER IN HIS LIMITED REPRESENTATION OF THE CO-DEFENDANTS (N.T. P.C.H.A. 4/24/74, 56). HE ALSO TESTIFIED THAT RESPONDENT DID NOT WANT TO TESTIFY FROM THE BEGINNING AND THAT AFTER A LENGTHY DISCUSSION BETWEEN COUNSEL AND RESPONDENT, AS WELL AS HIS FAMILY, RESPONDENT MADE THE DECISION NOT TO TESTIFY (N.T. P.C.H.A. 4/24/74, 10-11, 36; 5/15/74, 5-6).

THE PENNSYLVANIA COURTS, IN DENYING RESPONDENT RELIEF ON HIS INEFFECTIVE ASSISTANCE CLAIM, IMPLICITLY REJECTED ATTORNEY PERUTO'S TESTIMONY AND CREDITED THAT OF JUDGE DIBONA. THE PENNSYLVANIA SUPREME COURT FOUND THAT JUDGE DIBONA WAS RESPONDENT'S CHIEF TRIAL COUNSEL, AND AS SUCH HE MADE ALL DECISIONS RELEVANT TO SULLIVAN'S DEFENSE. COMMONWEALTH V. SULLIVAN, 472 PA. AT 161. PERUTO SERVED IN THE CAPACITY OF AN ASSISTANT COUNSEL, ALTHOUGH THE ROLES WERE REVERSED IN THE TRIALS OF THE CO-DEFENDANTS. IN LIGHT OF THIS, THE PENNSYLVANIA SUPREME COURT DETERMINED THAT NO DUAL REPRESENTATION, IN THE TRADITIONAL SENSE, EXISTED AND THAT NO EVIDENCE OF A CONFLICT WAS SHOWN. ID. AT 161-162.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH AMENDMENT STANDARD OF REVIEW UTILIZED BY THE COURT OF APPEALS FOR THE THIRD CIRCUIT IN DETERMINING CONFLICTS OF INTERESTS FOR DEFENSE ATTORNEYS IN STATE CRIMINAL TRIALS IS INCONSISTENT WITH STANDARDS ENUNCIATED BY EVERY OTHER COURT OF APPEALS AND FINDS NO SUPPORT IN THE PRIOR DECISIONS OF THIS COURT.

IN REVERSING RESPONDENT'S MULTIPLE MURDER CONVICTIONS ON SIXTH AMENDMENT CONFLICT OF INTEREST GROUNDS, THE COURT BELOW POSITED ITS STANDARD OF REVIEW AS FOLLOWS:

> THERE MUST BE SOME SHOWING OF A <u>POSSIBLE CONFLICT OF INTEREST OR PREJUDICE</u>, HOWEVER REMOTE, BEFORE A REVIEWING COURT WILL FIND THE DUAL REPRESENTATION CONSTITUTIONALLY DEFECTIVE ... ACTUAL PREJUDICE OR CONFLICT OF INTEREST NEED NOT BE SHOWN. THE MERE POSSIBILITY, HOWEVER REMOTE, IS SUFFICIENT.[5]

THE COURT BELOW, IN THE PARTICULAR CONTEXT OF THIS CASE, ALSO NOTED:

> ... RESPONDENTS ARE ASKING US TO DECIDE THAT THERE WAS IN FACT NO PREJUDICE. THIS MISSES THE POINT. THE STANDARD REQUIRES US TO DETERMINE WHETHER THERE IS A POSSIBILITY OF PREJUDICE, <u>OR CONFLICT OF INTEREST, HOWEVER REMOTE</u>. TO HOLD, IN THE FACE OF THIS RECORD, THAT THERE WAS NOT SUCH A POSSIBILITY WOULD BE TO, IN EFFECT, OVERRULE A LONG LINE OF CASES IN THIS CIRCUIT AND REQUIRE A SHOWING OF ACTUAL PREJUDICE. THIS WE CANNOT DO.

(EMPHASIS ADDED) ID. AT 522.

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[5] <u>UNITED STATES EX REL. SULLIVAN V. CUYLER</u>, 593 F.2D AT 519-520 (APPENDIX B, <u>INFRA</u>, AT PP. 12-13B).

IT IS RESPECTFULLY SUBMITTED THAT THE STANDARD UTILIZED BY THE COURT BELOW IMPROPERLY INTERPRETS THE SIXTH AMENDMENT REQUIREMENT THAT CRIMINAL DEFENDANTS BE AFFORDED THE EFFECTIVE ASSISTANCE OF COUNSEL AND HAS NO SUPPORT IN THIS COURT'S CONFLICTS OF INTEREST DECISIONS. SEE, E.G., GLASSER V. UNITED STATES, 315 U.S. 60 (1942), AND HOLLOWAY V. ARKANSAS, 435 U.S. 475 (1978). FURTHERMORE, THIS STANDARD IS TOTALLY INCONSISTENT WITH THAT USED IN EVERY OTHER CIRCUIT COURT OF APPEALS. FOR ALL OF THESE REASONS, THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE COURT BELOW.

THIS COURT HAS, IN THE PAST, COMMENTED ON THE DIFFERENT APPROACHES BY VARIOUS COURTS IN DETERMINING THE EXISTENCE OF CONFLICTS OF INTEREST. HOLLOWAY V. ARKANSAS, 98 S. CT. AT 1178. VARIOUS COMMENTATORS HAVE ALSO INDICATED THAT THE COURTS OF APPEAL ARE IN DISARRAY IN THEIR RESOLUTION OF THIS PROBLEM. SEE, E.G., GEER, REPRESENTATION OF MULTIPLE CRIMINAL DEFENDANTS: CONFLICTS OF INTEREST AND THE PROFESSIONAL RESPONSIBILITY OF THE DEFENSE ATTORNEY, 62 MINN. L. REV. 119 (1977); HYMAN, JOINT REPRESENTATION OF MULTIPLE DEFENDANTS IN A CRIMINAL TRIAL: THE COURT'S HEADACHE, 5 HOFSTRA L. REV. 315 (1977); COMMENTS: CONFLICT OF INTERESTS IN MULTIPLE REPRESENTATION OF CRIMINAL CO-DEFENDANTS, 68 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 226 (1977); NOTE, ENSURING EFFECTIVE ASSISTANCE OF COUNSEL FOR THE

CRIMINAL CO-DEFENDANT, 37 LA. L. REV. 1289 (1977); WANAT, CONFLICTS OF INTEREST IN CRIMINAL CASES AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL - THE NEED FOR CHANGE, 10 RUT. - CAM. L. REV. 57 (1978).

IN GLASSER V. UNITED STATES, SUPRA, THIS COURT HELD THAT BY REQUIRING AN ATTORNEY TO REPRESENT TWO CO-DEFENDANTS WHOSE INTERESTS WERE IN CONFLICT, WHICH CONFLICT WAS BOTH READILY APPARENT AND POINTED OUT TO THE COURT, ONE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL. IN HOLLOWAY V. ARKANSAS, THIS COURT REAFFIRMED GLASSER BY HOLDING THAT ONCE AN IMPERMISSIBLE CONFLICT OF INTEREST IS SHOWN, AND THE TRIAL COURT REFUSES TO APPOINT SEPARATE COUNSEL OVER OBJECTION, NO INQUIRY INTO THE DEGREE OF PREJUDICE IS NECESSARY. 98 S. CT. AT 1181. HOWEVER, THIS COURT IMPLICITLY INDICATED THAT A CONFLICT OF INTEREST MUST BE SHOWN:

> FINALLY, A RULE REQUIRING A DEFENDANT TO SHOW THAT A CONFLICT OF INTERESTS - WHICH HE AND HIS COUNSEL TRIED TO AVOID BY TIMELY OBJECTIONS TO THE JOINT REPRESENTATION - PREJUDICED HIM IN SOME SPECIFIC FASHION WOULD NOT BE SUSCEPTIBLE TO INTELLIGENT, EVENHANDED APPLICATION ... AND TO ASSESS THE IMPACT OF A CONFLICT OF INTERESTS ON THE ATTORNEY'S OPTIONS, TACTICS AND DECISIONS IN PLEA NEGOTIATIONS WOULD BE VIRTUALLY IMPOSSIBLE.

98 S. CT. AT 1182 (EMPHASIS ADDED).

PETITIONER HEREIN DOES NOT CHALLENGE THE CLEARLY ESTABLISHED PRINCIPLE THAT ONCE A CONFLICT OF INTEREST IS ESTABLISHED, NO INQUIRY INTO THE DEGREE OF PREJUDICE IS NECESSARY. THE THIRD CIRCUIT COURT OF APPEALS, HOWEVER, HAS

GONE FURTHER IN ITS APPROACH AND EXPRESSLY HELD THAT ALL A HABEAS CORPUS PETITIONER NEED SHOW TO OBTAIN RELIEF IS A POSSIBILITY THAT A CONFLICT OF INTEREST MAY HAVE EXISTED. THUS, IN THE THIRD CIRCUIT, A HABEAS PETITIONER NOT ONLY IS NOT REQUIRED TO ESTABLISH ACTUAL PREJUDICE, HE ALSO HAS NO BURDEN TO EVEN ESTABLISH THE EXISTENCE OF AN ACTUAL CONFLICT.

THE MINIMAL STANDARD EMPLOYED BY THE COURT BELOW PUTS IT AT ODDS WITH EVERY OTHER COURT OF APPEALS, SAVE ARGUABLY THE DISTRICT OF COLUMBIA COURT OF APPEALS. THE OVERWHELMING MAJORITY OF CIRCUIT COURTS OF APPEAL REQUIRE THAT AN ACTUAL CONFLICT OF INTEREST OR ACTUAL PREJUDICE BE ESTABLISHED. SEE, E.G., UNITED STATES V. FOSTER, 469 F.2D 1 (1ST CIR. 1972) (DEFENDANT DID NOT SHOW ANY PREJUDICE FROM JOINT REPRESENTATION); KAPLAN V. BOMBARD, 573 F.2D 708 (2ND CIR. 1978) (DEFENDANT MUST SHOW SOME SPECIFIC INSTANCE OF PREJUDICE, SOME REAL CONFLICT OF INTEREST); UNITED STATES V. CARRIGAN, 543 F.2D 1053 (2ND CIR. 1976) (REAL CONFLICT OF INTEREST AND PREJUDICE PRESENT SINCE EACH DEFENDANT GAVE DIFFERENT VERSION OF INCIDENT TO POLICE AND DEFENDANT'S TRIAL TESTIMONY WAS IN CONFLICT WITH THE CO-DEFENDANT'S STATEMENT, WHICH WAS ALSO ADMITTED AT TRIAL); UNITED STATES V. ATKINSON, 565 F.2D 1283 (4TH CIR. 1977), CERT. DENIED, 98 S. CT. 2845 (1978) (DEFENDANT MUST SHOW SOME SPECIFIC INSTANCE OF PREJUDICE AND SOME REAL CONFLICT OF INTEREST); HAGGARD V. STATE OF ALABAMA, 550 F.2D 1019, REHEARING DENIED, 554 F.2D 475 (5TH CIR. 1977) (DEFENDANT MUST SHOW ACTUAL

PREJUDICE); FOXWORTH V. WAINWRIGHT, 516 F.2D 1072 (5TH CIR. 1975) (ACTUAL PREJUDICE EXISTS AS TO MINIMALLY INVOLVED DEFENDANT SINCE PLAUSIBLE DEFENSE OF SHIFTING BLAME TO CO-DEFENDANTS FORECLOSED BY JOINT REPRESENTATION); THACKER V. BORDENKIRCHER, 590 F.2D 640 (6TH CIR. 1979) (DEFENDANT MUST SHOW THAT THERE WAS A CONFLICT OF INTEREST AND THAT HE WAS PREJUDICED THEREBY; THE ESTABLISHMENT OF MERE POTENTIAL CONFLICT ARISING FROM JOINT REPRESENTATION IS NOT SUFFICIENT TO CONSTITUTE DENIAL OF THE SIXTH AMENDMENT); UNITED STATES V. WOODS, 544 F.2D 242 (6TH CIR. 1976), CERT. DENIED, 429 U.S. 1062 (1977) (DEFENDANT MUST SHOW ACTUAL PREJUDICE); UNITED STATES EX REL. MCCLINDON V. WARDEN, ILL. ST. PEN., 575 F.2D 108 (7TH CIR. 1978) (DEFENDANT MUST SHOW THAT A CONFLICT OF INTEREST EXISTED IN FACT); UNITED STATES V. MANDELL, 525 F.2D 671 (7TH CIR. 1975), CERT. DENIED, 423 U.S. 1049 (1976) (DEFENDANT MUST SHOW WITH A REASONABLE DEGREE OF SPECIFICITY THAT A CONFLICT OF INTEREST ACTUALLY EXISTED AT TRIAL; SOMETHING MORE THAN "A POSSIBLE CONFLICT OF INTEREST, HOWEVER REMOTE" NEEDED); DAVIDSON V. CUPP, 446 F.2D 642 (9TH CIR. 1971) (DEFENDANT MUST SHOW SPECIFIC PREJUDICE IN ORDER TO PREVAIL); WATKINS V. WILSON, 408 F.2D 351 (9TH CIR. 1969) (DEFENDANT MUST DEMONSTRATE THAT SOME SPECIFIC PREJUDICE RESULTED FROM THE JOINT REPRESENTATION); FRYAR V. UNITED STATES, 404 F.2D 1071 (10TH CIR. 1968), CERT. DENIED, 395 U.S. 964 (1969) (DEFENDANT MUST SHOW THAT PREJUDICE RESULTED FROM THE JOINT REPRESENTATION).

THE EIGHTH CIRCUIT COURT OF APPEALS REQUIRES A SHOWING OF ACTUAL PREJUDICE OR A SUBSTANTIAL POSSIBILITY OF A CONFLICT OF INTEREST. AUSTIN V. ERICKSON, 477 F.2D 620 (8TH CIR. 1973); BERAN V. UNITED STATES, 580 F.2D 324 (8TH CIR. 1978), CERT. DENIED, ___ U.S. ___, 99 S. CT. 1422 (1979) (DEFENDANT MUST SHOW THAT THERE WAS AN ACTUAL CONFLICT OF INTEREST OR A SUBSTANTIAL POSSIBILITY OF SUCH A CONFLICT).

THE CONFLICT OF INTEREST STANDARD IN THE DISTRICT OF COLUMBIA CIRCUIT REQUIRES THE COURT TO DETERMINE IF THE RECORD SHOWS THE ABSENCE OF PREJUDICE OR A CONFLICT OF INTEREST BEYOND A REASONABLE DOUBT. LOLLAR V. UNITED STATES, 376 F.2D 243 (D.C. CIR. 1967). EVEN THAT STANDARD, HOWEVER, REQUIRES THE COURT TO EXAMINE THE RECORD AS A WHOLE TO DETERMINE THE POSSIBILITY OF PREJUDICE.

THE STANDARD OF REVIEW OF THE COURT BELOW IS UNWARRANTED AND, IT IS RESPECTFULLY SUBMITTED, GOES FAR BEYOND THE CONSTITUTIONAL STANDARDS ESTABLISHED IN ALL OTHER CIRCUITS. CERTAINLY THIS COURT HAS NEVER INDICATED THAT THE UNITED STATES CONSTITUTION IS VIOLATED BY THE EXISTENCE OF A POSSIBLE CONFLICT OF INTEREST OR PREJUDICE, HOWEVER REMOTE.

IN LIGHT OF THE SPLIT OF AUTHORITY REFERRED TO ABOVE AND THE FACT THAT THE INSTANT CLAIM WAS REJECTED BY PENNSYLVANIA'S HIGHEST COURT, AS WELL AS THE UNITED STATES DISTRICT COURT BELOW, AND BECAUSE THE DECISION OF THE COURT BELOW WILL PLACE

AN UNWARRANTED BURDEN ON STATE PROSECUTORS IN THE THIRD CIRCUIT, IT IS RESPECTFULLY REQUESTED THAT THIS COURT ISSUE A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

II. Even Assuming That The Standard Of Review Applied Below Is Constitutionally Mandated When Court Appointed Counsel Represents Two Or More Defendants At The Same Trial, The Circumstances Presented Herein, Namely The Representation Of Respondent And His Separately Tried Co-Defendants By Two Privately Retained Attorneys, Compels The Use Of A Different Standard Of Review Under The Sixth Amendment.

Even if this Court were to determine that the Sixth Amendment standard of review utilized below is constitutionally required as a general proposition, the circumstances herein mandate a stricter standard of review. Such review must require a showing, in fact, of an actual conflict of interest or prejudice, in order to reverse state criminal convictions. By its failure to differentiate between joint and separate trials, as well as privately retained versus court appointed counsel, the Court below misconstrued the Sixth and Fourteenth Amendments of the Constitution.

Initially, the instant record reveals that respondent was tried apart from his two co-defendants, both of whom were subsequently and separately tried. There can be no doubt that the many unfavorable aspects of a joint criminal trial can weigh heavily against a criminal defendant. Considerations such as varying degrees of culpability; differences in defense strategies; the possibility of guilt by association; and the decision whether to testify or not, are all accentuated in the context of a joint trial.[6] In the context of separate trials,

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[6] See, e.g., ABA Standards Relating to the Administration of Criminal Justice, Joinder and Severance, §13-2.2 (2nd ed. 1978).

however, the possibility of any inherent unfairness is nonexistent. Thus, it has been held that a greater showing of prejudice in conflicts claims must be made in cases of dual representation[7] as opposed to joint representation. See, e.g., Miller v. United States, 564 F.2d 103, 106 (1st Cir. 1977), cert. denied, 435 U.S. 931 (1978).

The instant record reveals, at most, dual representation by two privately retained attorneys. In fact, both the Pennsylvania Supreme Court and the United States District Court determined that the concept of dual representation, in its traditional sense, was inapplicable instantly.[8] Both courts found that the significant differences in the division of responsibility between respondent's two privately retained counsel precluded a finding of dual representation.[9]

Whether or not the division of responsibility by respondent's attorneys precludes a finding of dual representation, the fact that respondent was separately tried surely warrants a stricter

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[7] Hereinafter, the phrase dual representation refers to the concept of an attorney representing co-defendants who are separately tried.

[8] Commonwealth v. Sullivan, Appendix D, infra, at 33-34D; United States ex rel. Sullivan v. Cuyler, Appendix C, infra, at 5C.

[9] Judge DiBona was respondent's chief trial counsel. Attorney Peruto testified that Judge DiBona made the ultimate decisions in respondent's representation (N.T. P.C.H.A. 4/24/74, 90, 108-109). The roles were reversed in the separate trials of the two co-defendants (N.T. P.C.H.A. 4/24/74, 90).

STANDARD OF REVIEW THAN THAT APPLIED BY THE COURT BELOW. IN THE FACTUAL CONTEXT PRESENTLY INVOLVED, IT IS RESPECTFULLY SUBMITTED THAT AN ACTUAL CONFLICT OF INTEREST OR PREJUDICE MUST BE DEMONSTRATED. NO SUCH CONFLICT OR PREJUDICE EXISTS HEREIN.

ADDITIONALLY, THE COURT BELOW FAILED TO RECOGNIZE THE FACT THAT A DIFFERENT STANDARD OF REVIEW WAS REQUIRED SINCE RESPONDENT'S REPRESENTATION WAS OF HIS OWN CHOOSING, AND NOT THAT OF THE STATE'S. RESPONDENT, ALONG WITH HIS CO-DEFENDANTS, PRIVATELY RETAINED TWO EXCEEDINGLY EXPERIENCED CRIMINAL TRIAL ATTORNEYS. UNDER THESE CIRCUMSTANCES, HABEAS CORPUS RELIEF WOULD ONLY BE WARRANTED IF (1) RESPONDENT'S REPRESENTATION WAS SO LACKING IN EFFECTIVENESS, BECAUSE OF THE DUAL REPRESENTATION, AS TO HAVE DEPRIVED HIM OF A FUNDAMENTALLY FAIR TRIAL; OR (2) THE TRIAL JUDGE OR PROSECUTOR KNEW THAT RESPONDENT RECEIVED INCOMPETENT REPRESENTATION AND TOOK NO REMEDIAL ACTION, OR THAT THE INCOMPETENCY OF RESPONDENT'S REPRESENTATION WAS SO APPARENT THAT THEY SHOULD HAVE BEEN AWARE OF IT AND COULD HAVE CORRECTED IT. ONLY THEN CAN RESPONDENT'S RETAINED ATTORNEYS' ACTIONS BE ATTRIBUTED TO THE COMMONWEALTH FOR FOURTEENTH AMENDMENT REVIEW PURPOSES.

THE COURT BELOW FOUND A SIXTH AMENDMENT VIOLATION IN THE DUAL REPRESENTATION OF RESPONDENT AND TWO SEPARATELY TRIED CO-DEFENDANTS BY TWO RETAINED ATTORNEYS BECAUSE, IN ITS VIEW, A POSSIBILITY OF CONFLICTING INTERESTS OR PREJUDICE, HOWEVER REMOTE, EXISTED. SUCH A DETERMINATION MISCONSTRUES THE

UNITED STATES CONSTITUTION AND FINDS NO SUPPORT IN ANY OF THE DECISIONS OF THIS COURT OR ANY OTHER FEDERAL APPELLATE COURT. BY MECHANICALLY APPLYING ITS OWN CONFLICT OF INTEREST STANDARD, AS WELL AS IGNORING CERTAIN CONTRARY THIRD CIRCUIT DECISIONAL LAW,[10] THE COURT BELOW IMPROPERLY EXTENDED SIXTH AMENDMENT REVIEW.

WITH RESPECT TO INDIGENT STATE CRIMINAL DEFENDANTS, THIS COURT HAS DETERMINED THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THE APPOINTMENT OF EFFECTIVE COUNSEL. POWELL V. ALABAMA, 287 U.S. 45, 71 (1932). ADDITIONALLY, IF COUNSEL'S REPRESENTATION AMOUNTS TO A MERE FORMALITY OR SHAM, DUE PROCESS ALONE VITIATES THE PROCEEDINGS. AVERY V. ALABAMA, 308 U.S. 444 (1940); HAWK V. OLSEN, 326 U.S. 271 (1945); WHITE V. RAGEN, 324 U.S. 760 (1945); HOUSE V. MAYO, 324 U.S. 42 (1945). SIMILARLY, UNDER THE SIXTH AMENDMENT, AN INDIGENT MUST BE PROVIDED WITH APPOINTED COUNSEL IN ALL STATE CRIMINAL TRIALS INVOLVING IMPRISONMENT. GIDEON V. WAINWRIGHT, 372 U.S. 335, 344-345 (1963); ARGERSINGER V. HAMLIN, 407 U.S. 25 (1972); SCOTT V. ILLINOIS, ___ U.S. ___, 99 S. CT.

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[10] UNITED STATES EX REL. DARCY V. HANDY, 203 F.2D 407, 426-427 (3RD CIR.) (EN BANC), CERT DENIED, 346 U.S. 865 (1953); UNITED STATES EX REL. WILKINS V. BANMILLER, 205 F. SUPP. 123 (E.D. PA. 1962), AFF'D, 325 F.2D 514, 516 (3RD CIR. 1963), CERT. DENIED, 379 U.S. 847 (1964); UNITED STATES EX REL. O'BRIEN V. MARONEY, 423 F.2D 865, 869-870 (1970); UNITED STATES EX REL. GREEN V. RUNDLE, 434 F.2D 1112, 1113 (3RD CIR. 1970); UNITED STATES EX REL. HART V. DAVENPORT, 478 F.2D 203, 210-211 (3RD CIR. 1973).

1158 (1979).[11] In such cases the state action requirement of Fourteenth Amendment review is obvious since the state is directly responsible in selecting counsel.

However, since respondent exercised his fundamental right to counsel of his choice, the Court below utilized an erroneous standard of review in finding a Sixth Amendment violation attributable to the Commonwealth of Pennsylvania.

In order for a Sixth Amendment violation to have occurred it must be shown that the trial judge or prosecutor knew that respondent received incompetent representation and took no remedial action, or that the incompetency of respondent's representation was so apparent that they should have been aware of it and could have corrected it. Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir.), cert. denied, 422 U.S. 1011 (1975). Only then can a privately retained attorney's actions be attributed to the state for Fourteenth Amendment purposes.

The Third Circuit Court of Appeals has recognized the above distinction, but nevertheless chose to ignore it herein. United States ex rel. Hart v. Davenport, 478 F.2d 203, 210-211 (3rd Cir. 1973). Nowhere in its opinion granting relief does

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[11] In the context of recommending that a defendant plead guilty, this Court has defined effective assistance to mean that such advice be "within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771 (1970); Tollett v. Henderson, 411 U.S. 258 (1973). Other than the above definition, this Court has never explicitly defined the minimum degree of effectiveness necessary for Sixth Amendment purposes. Maryland v. Marzullo, 435 U.S. 1011, 98 S. Ct. 1885 (1978) (Justices White and Rhenquist dissenting from this Court's denial of Certiorari to review Fourth Circuit's adoption of a new constitutional standard in Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977).

the Court below differentiate between retained versus appointed counsel. As the three judge dissent from the order denying rehearing in banc stated:

> But although state action was found to be present in Hart, there would appear to be no evidence in the present case that the trial judge or the prosecutor was aware, or should have been aware, of the alleged conflict of interest. And certainly nothing in the record suggests that Sullivan's representation by two of Philadelphia's best known trial attorneys was so grossly deficient as to render the proceedings fundamentally unfair.

Appendix A, infra, at .

In United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978), the Fifth Circuit appropriately reconciled its conflict of interest standard of review with the privately retained versus appointed counsel dichotomy. The government argued that a more stringent test was required for determining the effectiveness of counsel in conflicts cases involving retained counsel. The Court stated (Id. at 1256):

> Applying, as we must, the standards established by Fitzgerald for judging effectiveness-of-counsel claims, we find that conflict-of-interest cases such as the instant one fall within the due process category of cases. Consequently, we hold that an attorney, whether retained or appointed laboring under an actual conflict of interest in his representation of an accused fails to accord him effective assistance of counsel as guaranteed by the due process clause of the Fifth Amendment, and a fortiori, the Sixth Amendment.

THE COURT THEREAFTER DETERMINED THAT AN ACTUAL CONFLICT OF INTEREST EXISTED, AND RELYING ON THIS COURT'S DECISION IN HOLLOWAY V. ARKANSAS, SUPRA, CORRECTLY DETERMINED THAT NO SHOWING OF PREJUDICE IS REQUIRED ONCE AN ACTUAL CONFLICT OF INTEREST IS ESTABLISHED. UNITED STATES V. ALVAREZ, SUPRA AT 1259 N. 14.

BY ATTRIBUTING TO THE STATE, FOR FOURTEENTH AMENDMENT PURPOSES, ITS FINDING THAT A POSSIBILITY OF PREJUDICE, HOWEVER REMOTE, IS SUFFICIENT TO WARRANT HABEAS CORPUS RELIEF IN THIS CASE, THE COURT BELOW HAS ENTERED AN UNCHARTERED SEA, AND CONSTITUTIONALLY MISCONSTRUES THE SIXTH AND FOURTEENTH AMENDMENTS, AND THIS COURT'S PRIOR CONFLICTS OF INTERESTS DECISIONS.

PETITIONER READILY CONCEDES THAT CERTAIN COURTS HAVE REJECTED ANY DISTINCTION BETWEEN RETAINED VERSUS APPOINTED COUNSEL IN WEIGHING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.[12] HOWEVER, IN EACH OF THESE CIRCUITS, IN ORDER TO SECURE SIXTH AMENDMENT RELIEF ON CONFLICT OF INTEREST GROUNDS, THE CONSTITUTIONAL STANDARD OF REVIEW REQUIRES A SHOWING OF AN ACTUAL CONFLICT

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[12] UNITED STATES V. FOSTER, 469 F.2D 1, 4 N. 2 (1ST CIR. 1972); UNITED STATES V. ALBERTI, 470 F.2D 878, 881 (2ND CIR. 1972), CERT. DENIED, 411 U.S. 919 (1973); CRAIG V. UNITED STATES, 217 F.2D 355, 359 (6TH CIR. 1954); GOODWIN V. CARDWELL, 432 F.2D 521, 522 (6TH CIR. 1970); UNITED STATES EX REL. ROBINSON V. HOUSEWRIGHT, 525 F.2D 988, 994 N. 8 (7TH CIR. 1975); UNITED STATES V. MARSHALL, 488 F.2D 1169, 1192-1193 (9TH CIR. 1973).

ALTHOUGH THE EIGHTH CIRCUIT IN THE PAST MADE NO DISTINCTION BETWEEN RETAINED AND APPOINTED COUNSEL IN JUDGING INEFFECTIVENESS CLAIMS, LARRY BUFFALO CHIEF V. SOUTH DAKOTA, 425 F.2D 271, 279 (8TH CIR. 1970), IT RECENTLY INDICATED THAT THERE MAY WELL BE DIFFERENT CONSTITUTIONAL STANDARDS APPLICABLE. GARTON V. SWENSON, 497 F.2D 1137, 1139 N. 4 (8TH CIR. 1974). SEE ALSO, UNITED STATES V. BOSCH, 584 F.2D 1113, 1123 N. 7 (1ST CIR. 1978).

OF INTEREST OR PREJUDICE.[13] AS THE FIFTH CIRCUIT MAKES CLEAR, IN ALVAREZ, SUPRA, WHENEVER AN ACTUAL CONFLICT OF INTEREST EXISTS, THE TRIAL IS FUNDAMENTALLY UNFAIR AND IPSO FACTO FOURTEENTH AND SIXTH AMENDMENT VIOLATIONS OCCUR.

BY IGNORING THE PRIVATE VERSUS RETAINED COUNSEL DISTINCTION, WHILE SIMULTANEOUSLY APPLYING A TOTALLY INAPPROPRIATE STANDARD OF REVIEW, THE COURT BELOW MISAPPLIED THE UNITED STATES CONSTITUTION. THE COURT ADAMANTLY REFUSED TO INQUIRE INTO THE ACTUAL EXISTENCE OF A CONFLICT OF INTEREST OR PREJUDICE:

> RESPONDENTS ALSO ARGUE THAT ULTIMATELY IT WAS PETITIONER HIMSELF, AND NOT HIS ATTORNEYS, WHO DECIDED NOT TO TAKE THE WITNESS STAND AND THAT HIS DECISION WAS BASED ON PERSONAL CONSIDERATIONS AND NOT INFLUENCED BY DUAL REPRESENTATION. FURTHER, THEY SUBMIT, ONCE PETITIONER HAD DECIDED NOT TO TESTIFY THERE WERE NO WITNESSES WHOSE TESTIMONY WOULD HAVE BEEN WORTHWHILE. ANY COMPLAINT ABOUT THE FAILURE TO PRODUCE DEFENSE WITNESSES IS, IN THEIR JUDGMENT, ILLUSORY. THESE ARGUMENTS ARE ALSO DIRECTED TO THE QUESTION WHETHER THERE WAS ACTUAL PREJUDICE WHICH, AS WE HAVE NOTED, WE MAY NOT CONSIDER.

UNITED STATES EX REL. SULLIVAN V. CUYLER ET AL., APPENDIX, INFRA, AT 19B.

IN SUM, WHETHER OR NOT THE EXCEEDINGLY LIBERAL SIXTH AMENDMENT STANDARD OF REVIEW UTILIZED BELOW IS CONSTITUTIONALLY REQUIRED IN JOINT REPRESENTATION COURT APPOINTMENT CASES, IT CERTAINLY IS ERRONEOUS AS APPLIED TO RESPONDENT HEREIN.

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[13] THE DISTRICT OF COLUMBIA COURT OF APPEALS, WHILE REJECTING THE DISTINCTION, LOLLAR V. UNITED STATES, SUPRA AT 245-246, STILL MANDATES AN INQUIRY INTO THE EXISTENCE OF PREJUDICE IN FACT, ALTHOUGH REQUIRING THE GOVERNMENT TO PROVE ITS ABSENCE.

SINCE RESPONDENT WAS REPRESENTED BY PRIVATELY RETAINED COUNSEL, TRIED SEPARATELY FROM HIS TWO CO-DEFENDANTS, AND AFFORDED REPRESENTATION THAT WAS NEITHER FUNDAMENTALLY UNFAIR NOR SO DEFECTIVE AS TO PUT THE TRIAL COURT OR PROSECUTOR ON NOTICE OF ANY ALLEGED CONFLICT OF INTEREST, ONLY AN ACTUAL CONFLICT OF INTEREST OR PREJUDICE WOULD WARRANT REVERSAL. NO SUCH SHOWING EXISTS ON THIS RECORD.

FOR THE REASONS STATED ABOVE, THIS COURT IS RESPECTFULLY REQUESTED TO ISSUE A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

III. THE DECISION OF THE COURT BELOW VIOLATED SETTLED PRINCIPLES OF HABEAS CORPUS REVIEW, AS ENUNCIATED BY THIS COURT AND CONGRESS, BY ENCROACHING UPON THE FACTUAL DETERMINATIONS MADE IN THE STATE COURT SYSTEM, AND SUBSTITUTING ITS OWN FINDINGS OF FACT FOR THOSE OF THE STATE COURTS AND THE DISTRICT COURT.

IN TOWNSEND V. SAIN, 372 U.S. 293 (1963), THIS COURT SET FORTH GENERAL STANDARDS GOVERNING HABEAS CORPUS PROCEEDINGS IN FEDERAL COURT. THIS COURT STATED (ID. AT 314-315):

> FURTHERMORE, THE COEQUAL RESPONSIBILITIES OF STATE AND FEDERAL JUDGES IN THE ADMINISTRATION OF FEDERAL CONSTITUTIONAL LAW ARE SUCH THAT WE THINK THE DISTRICT JUDGE MAY, IN THE ORDINARY CASE IN WHICH THERE HAS BEEN NO ARTICULATION, PROPERLY ASSUME THAT THE STATE TRIER OF FACT APPLIED CORRECT STANDARDS OF FEDERAL LAW TO THE FACTS, IN THE ABSENCE OF EVIDENCE ... THAT THERE IS REASON TO SUSPECT THAT AN INCORRECT STANDARD WAS IN FACT APPLIED. THUS, IF THIRD-DEGREE METHODS OF OBTAINING A CONFESSION ARE ALLEGED AND THE STATE COURT REFUSED TO EXCLUDE THE CONFESSION FROM EVIDENCE, THE DISTRICT JUDGE MAY ASSUME THAT THE STATE TRIER FOUND THE FACTS AGAINST THE PETITIONER, THE LAW BEING, THAT THIRD-DEGREE METHODS NECESSARILY PRODUCE A COERCED CONFESSION.

SUBSEQUENT TO TOWNSEND, CONGRESS AMENDED 28 U.S.C. §2254(D) TO PROVIDE IN RELEVANT PART:

> A DETERMINATION AFTER A HEARING ON THE MERITS OF A FACTUAL ISSUE, MADE BY A STATE COURT OF COMPETENT JURISDICTION ... EVIDENCED BY A WRITTEN FINDING, WRITTEN OPINION, OR OTHER RELIABLE AND ADEQUATE WRITTEN INDICIA, SHALL BE PRESUMED TO BE CORRECT, UNLESS THE APPLICANT SHALL ESTABLISH OR IT SHALL OTHERWISE APPEAR, ... -"(1) THAT THE MERITS OF THE FACTUAL DISPUTE WERE NOT RESOLVED IN THE STATE COURT HEARING..."

IN LaVALLEE v. DELLE ROSE, 410 U.S. 690 (1973), THIS COURT FURTHER HELD THAT AN OPINION OF THE STATE TRIAL COURT MEETS THE REQUIREMENT OF 28 U.S.C. §2254(D)(1), IF A DISTRICT COURT CAN REASONABLY CONCLUDE THAT RELIEF WOULD HAVE BEEN GRANTED BY THE STATE COURT IF IT BELIEVED A DEFENDANT'S ALLEGATIONS.

HEREIN, THE CIRCUIT COURT BELOW, WITHOUT ANY ANALYSIS OF THE STATE COURT FACTUAL DETERMINATIONS[14] ON THE CONFLICT OF INTEREST QUESTION, GRANTED THE WRIT BASED ONLY ON THE STATE COURT RECORD. BY REVERSING THE PENNSYLVANIA SUPREME COURT, AS WELL AS THE DISTRICT COURT, SOLELY UPON THE INCONSISTENT AND CONTRADICTED TESTIMONY OF ONE OF RESPONDENT'S TRIAL ATTORNEYS, AND WITHOUT ORDERING AN ADDITIONAL EVIDENTIARY HEARING,[15] THE

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[14] WELL-ESTABLISHED THIRD CIRCUIT DECISIONAL LAW REQUIRES THAT GREAT DEFERENCE BE GRANTED TO STATE FACTUAL DETERMINATIONS. SEE, E.G., SCHMIDT v. HEWITT, 573 F.2D 794 (3RD CIR. 1978) (STATE COURT FACTUAL FINDINGS MUST BE ACCEPTED AS TRUE AND BURDEN ON PETITIONER TO ESTABLISH, BY CLEAR AND CONVINCING EVIDENCE, THAT STATE COURT FACTUAL DETERMINATIONS ARE ERRONEOUS; STATE SUPREME COURT HAS MORE LATITUDE IN REVIEWING TRIAL COURT DETERMINATIONS THAN A FEDERAL COURT DOES IN RULING ON HABEAS CORPUS PETITION); UNITED STATES EX REL. HAYWARD v. JOHNSON, 508 F.2D 322, 329 (3RD CIR.), CERT. DENIED, 422 U.S. 1011 (1975) (WHERE NO INDICATION THAT THE STATE COURT UTILIZED AN IMPROPER CONSTITUTIONAL STANDARD, AND THE FACTS AS RELATED BY PETITIONER WOULD ENTITLE HIM TO RELIEF UNDER THE PREVAILING CONSTITUTIONAL STANDARD, A FEDERAL COURT SHOULD ASSUME THAT THE STATE COURT WOULD PROPERLY APPLY THE LAW IF IT BELIEVED PETITIONER'S STORY; THEREFORE A STATE COURT DECISION DENYING RELIEF IS IN ALL LIKELIHOOD BASED ON DISCREDITING PETITIONER'S TESTIMONY AND ENTITLED TO THE PRESUMPTION OF CORRECTNESS).

[15] SEE, E.G., UNITED STATES EX REL. McNAIR v. STATE OF NEW JERSEY, 492 F.2D 1307 (3RD CIR. 1974) (WHEN LEGAL PROBLEMS ARE PRESENTED WHICH ARE NOT EASILY RESOLVED EVEN ON THE BASIS OF CLEARLY ESTABLISHED FACTS, AN EVIDENTIARY HEARING IS AN A FORTIORI PROPOSITION IF THE STATE RECORD IS DEFICIENT IN CRITICAL AREAS).

COURT SERIOUSLY INTRUDED UPON THE PRINCIPLES OF COMITY AND THE PROPER DEFERENCE WHICH MUST BE GIVEN TO STATE COURT CRIMINAL DETERMINATIONS.

RESPONDENT SOUGHT COLLATERAL RELIEF IN THE STATE COURT SYSTEM UNDER THE PENNSYLVANIA POST CONVICTION HEARING ACT.[16] IN HIS PETITION HE ALLEGED, WITHOUT PROVIDING SUPPORTING FACTS, THAT TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO PRESENT ANY DEFENSE AND THAT SUCH FAILURE WAS BASED UPON THE DUAL REPRESENTATION INVOLVED. AT THE CONCLUSION OF THE HEARING, THE COURT HELD THAT RESPONDENT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, BASED UPON THE TESTIMONY OF JUDGE DiBONA, RESPONDENT'S CHIEF TRIAL COUNSEL.[17] IN REVIEWING THIS DETERMINATION, THE PENNSYLVANIA SUPREME COURT HELD THAT THERE WAS NO CONFLICT OF INTEREST, SINCE THERE WAS NO DUAL REPRESENTATION IN THE TRADITIONAL SENSE, AND THAT RESPONDENT'S CHIEF TRIAL COUNSEL, JUDGE DiBONA, INDICATED THAT HIS STEWARDSHIP WAS IN NO WAY AFFECTED BY THE CONSIDERATION OF THE CO-DEFENDANTS' CASES, BUT WAS SOLELY A PRODUCT OF WHAT HE CONSIDERED TO BE THE BEST COURSE IN HIS REPRESENTATION OF SULLIVAN.[18] THE COURT FURTHER HELD THAT THE DECISION NOT TO PRESENT A DEFENSE WAS BASED UPON

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[16] THE ACT OF JANUARY 25, 1966, P.L. (1965) 1580 §1, 19 P.S. §1180-1 ET SEQ. (SUPPLEMENT 1979).

[17] OPINION OF STATE TRIAL COURT DENYING COLLATERAL RELIEF, APPENDIX, INFRA, AT 7F.

[18] COMMONWEALTH v. SULLIVAN, APPENDIX D. INFRA, AT 34D.

JUDGE DIBONA'S BELIEF THAT THERE WAS INSUFFICIENT EVIDENCE FOR A CONVICTION.[19] THE DISTRICT COURT CONCLUDED THAT THE STATE COURT FINDINGS WERE SUPPORTED BY THE STATE RECORD.[20]

SUCCINCTLY STATED, THE CIRCUIT COURT BELOW GRANTED THE WRIT BY RELYING SOLELY UPON THE CONTRADICTED AND CONTRADICTORY TESTIMONY OF ONE OF RESPONDENT'S ATTORNEYS TO THE EFFECT THAT NO DEFENSE WAS PRESENTED BECAUSE, AMONG OTHER THINGS, THERE WAS A FEAR OF EXPOSING ALLEGED DEFENSE WITNESSES BEFORE THE CO-DEFENDANTS' TRIALS. THE ISSUE UPON WHICH THE COURT BELOW REVERSED THE DISTRICT COURT WAS PRESENTED TO, AND REJECTED BY, THE STATE HEARING COURT AND THE STATE SUPREME COURT. OF NECESSITY, THOSE COURTS RELIED UPON THE TESTIMONY OF JUDGE DIBONA.

SINCE THE STATE COURT DECISIONS WERE SUPPORTED BY THE RECORD TESTIMONY OF JUDGE DIBONA, THE COURT BELOW SHOULD HAVE DENIED RELIEF. THUS, THE COURT'S DECISION DEPARTED FROM SETTLED PRINCIPLES OF HABEAS CORPUS REVIEW WHEN IT IGNORED SUCH TESTIMONY AND ENGAGED IN ITS OWN FACT FINDING. UNITED STATES EX REL. SULLIVAN V. CUYLER ET AL., APPENDIX B, INFRA, AT 15-17B. IF THE COURT DETERMINED THAT THE STATE COURT FINDINGS WERE INCOMPLETE OR INAPPROPRIATE, THE ONLY PROPER REMEDY WAS TO REMAND THE CASE TO THE DISTRICT COURT FOR INDEPENDENT FINDINGS OF FACT AFTER A

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[19] COMMONWEALTH V. SULLIVAN, APPENDIX D, INFRA, AT 34D.

[20] UNITED STATES EX REL. SULLIVAN V. CUYLER, APPENDIX C, INFRA, AT 5-8C.

PLENARY EVIDENTIARY HEARING. TOWNSEND V. SAIN, 372 U.S. 293 (1963); UNITED STATES EX REL. MCNAIR V. STATE OF NEW JERSEY, 492 F.2D 1307 (3RD CIR. 1974); UNITED STATES EX REL. FOYE V. STATE OF NEW JERSEY, 547 F.2D 217 (3RD CIR. 1977).

BECAUSE THE COURT BELOW VIOLATED SETTLED PRINCIPLES OF HABEAS CORPUS REVIEW AS ENUNCIATED BY THIS COURT AND CONGRESS, IT IS RESPECTFULLY REQUESTED THAT THIS COURT ISSUE A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT IN ORDER TO RESTORE COMITY TO ITS PROPER PLACE IN THE CIRCUIT.

CONCLUSION

FOR THE FOREGOING REASONS, THE COMMONWEALTH OF PENNSYLVANIA RESPECTFULLY REQUESTS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION BELOW.

RESPECTFULLY SUBMITTED,

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